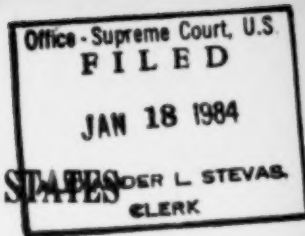


83 - 1196

No. 83-



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

AMERICAN TRUCKING ASSOCIATIONS, INC., NEW YORK
STATE MOTOR TRUCK ASSOCIATION, INC., NEW
YORK STATE MOVERS' AND WAREHOUSEMEN'S AS-
SOCIATION, INC., FORT EDWARD EXPRESS CO.,
HALLAMORE MOTOR TRANSPORTATION, INC.,
MAISLIN TRANSPORT OF DELAWARE, INC., MUSH-
ROOM TRANSPORTATION CO., RED STAR EXPRESS
LINES OF AUBURN, INC., SHAY'S SERVICE, INC., and
TEAL'S EXPRESS, INC.,

Appellants,

v.

NEW YORK STATE TAX COMMISSION, JAMES H. TULLY,
JR., THOMAS H. LYNCH, and FRANCIS KOENIG,
Members of the New York State Tax Commission,
and ROBERT ABRAMS, Attorney General of the State
of New York,

Appellees.

On Appeal From the Court of Appeals of New York

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Do the Due Process Clause and the Commerce Clause require a substantial nexus between a state levying a gross receipts tax on transactions outside the state and the activity or transaction subjected to such tax?

2. May a tax on interstate commerce be upheld although it does not meet all of the four tests of *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977)?

3. May the "unitary business" principle, applicable with respect to taxes on net income, be extended to state gross receipts taxes so as to permit a finding of sufficient nexus by reason of a taxpayer's activities in the taxing state otherwise unrelated to the taxed transaction?

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Appellants,

v.

NEW YORK STATE TAX COMMISSION, JAMES H. TULLY,
JR., THOMAS H. LYNCH, and FRANCIS KOENIG,
Members of the New York State Tax Commission,
and ROBERT ABRAMS, Attorney General of the State
of New York,

Appellees.

On Appeal From the Court of Appeals of New York

JURISDICTIONAL STATEMENT

This case presents much the same question regard-
ing this Court's cases on the nexus requirement in state
taxation and the applicability of the unitary business
principle to a gross receipts tax as did *Armco v.*
Hardesty, No. 83-297, *probable jurisdiction noted*, De-
cember 12, 1983. It does so, however, in the context of
an apportioned tax that reaches *all* receipts of a taxpayer
regardless of whether those receipts bear any relation-

ship whatever to the taxing state rather than in that of an unapportioned tax that reaches only gross receipts believed by the taxing state to satisfy the nexus requirement. Thus, the record in this case presents an aspect of the attempted expansion by the states of the applicability of the unitary business principle that is different from, but closely related to, that presented by *Armco*.

Appellants, three trade associations of motor carriers and seven motor carriers, appeal from the final order of the Court of Appeals of New York, which affirmed a judgment of the Supreme Court of New York for Albany County. The Court of Appeals held that Section 184 of the New York Tax Law, as amended by Laws 1981, Ch. 486, does not violate the Commerce Clause and the Due Process Clause of the United States Constitution even though the tax imposed thereby clearly reaches transactions having no nexus with New York State.

All parties to this proceeding are named in the caption. A Designation of Corporate Relationships pertaining to each of the Appellants is, pursuant to Rule 28.1, found at Appendix E below.

OPINIONS BELOW

The memorandum opinion of the New York Court of Appeals (Appendix A) is reported at 60 N.Y.2d 745 (1983). The opinion of the Supreme Court for Albany County (Appendix B) is reported at 120 Misc. 2d 191, 467 N.Y.S.2d 744 (1982).

JURISDICTION

The Court of Appeals rendered its opinion and entered a final order on October 20, 1983, affirming the judgment of the Supreme Court, from which appeal to the Court of Appeals had been taken. A Notice of Appeal (Appendix D) was filed in the New York Court of Appeals on January 16, 1984. The period within which to docket this appeal in this Court expires on January 18,

1984, and timely docketing has been made. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Commerce Clause (Article I, Section 8, Clause 3) and Due Process Clause (Amendment XIV) of the United States Constitution.

New York Laws 1981, Chapter 486 (amending New York Tax Law Section 184).

These constitutional and statutory provisions are reproduced in pertinent part in Appendix F.

STATEMENT OF THE CASE

Appellants are three trade associations of motor carriers and seven motor carriers which engage in transportation activities in interstate and intrastate commerce in New York State, as well as in interstate commerce wholly outside New York, intrastate commerce in states other than New York, and domestic Canadian commerce. Appellants challenge the validity, under the United States Constitution, of Section 184 of the New York Tax Law as it was amended in July 1981 so as to impose a gross receipts tax on all transactions of a motor carrier, including transactions that have nothing whatever to do with New York State.

New York State imposes franchise taxes on transportation and transmission corporations (*i.e.*, those engaged in the telephone, telegraph, pipeline, shipping, railroad, air carrier, and motor carrier businesses) in Article 9 of the Tax Law. The primary tax imposed by Article 9 is contained in Tax Law Section 184 and is based on gross receipts. Prior to the adoption of Laws 1981, Ch. 486, Section 184 excluded from the gross receipts tax imposed thereby all receipts derived from business of an interstate character. It provided that receipts from business both originating and terminating in New York

(and therefore in some sense intrastate) but traveling another state, as well as New York, were taxable but were apportioned — in accordance with this Court's decision in *Central Greyhound Lines v. Mealey*, 334 U.S. 653 (1948) — to New York by a fraction the numerator of which was the mileage within New York and the denominator of which was the total mileage of such business.

In July 1981, the New York State Legislature enacted a package of five increased or new taxes intended to fund the operating deficits of the Metropolitan Transportation Authority (the transportation authority for New York City and seven surrounding counties) and to avoid or limit an increase in bus, subway, and train fares. The package was enacted at great speed and under great political pressure. The resultant lack of time for consideration, plus the Legislature's goal — shown clearly by the legislative history — of imposing taxes the economic burden of which would fall to the maximum possible extent on non-New Yorkers, led to numerous constitutional and other defects that have resulted in repeal or judicial declaration of invalidity of much of the package.¹

1. Laws 1981, Ch. 486, the Act challenged herein, was repealed insofar as it applied to shipping and railroad corporations in Laws 1981, Ch. 1043, §6 and was declared invalid by the courts insofar as it applied to air transportation in *Air Transport Association v. New York State Department of Taxation & Finance*, 91 A.D.2d 169, 458 N.Y.S.2d 319, *aff'd*, 59 N.Y.2d 917, 453 N.E.2d 548, 466 N.Y.S.2d 319, *cert. denied*, 104 S. Ct. 392 (1983). A three quarters of one percent gross receipts tax on oil companies, enacted in Laws 1981, Ch. 481, and a requirement that oil companies report their income to New York for purposes of the Article 9-A net income tax using the world-wide unitary method, enacted in Laws 1981, Ch. 484, were repealed in Laws 1983, Ch. 400. A ten percent capital gains tax on sales of commercial and industrial real estate within New York City where the consideration for such sale was \$1,000,000 or more, enacted in Laws 1981, Ch. 487, was repealed in Laws 1982, Ch. 57.

One of the taxes enacted at that time, Laws 1981, Ch. 486, extends the tax imposed by Section 184 of the Tax Law to reach all receipts of a transmission or transportation corporation wherever earned and whether or not such receipts bear any connection to New York State. The Act does provide for apportionment of the gross receipts and the apportionment formula applicable to Appellants is as follows:

A transportation or transmission corporation shall determine its gross earnings from transportation and transmission services within this state (except as otherwise provided for in this subdivision) by multiplying its gross earnings from transportation and transmission within and without the state by a fraction, the numerator of which is the taxpayer's mileage within this state and the denominator of which is the taxpayer's mileage within and without this state during the period covered by the report or reports required by this chapter.

N.Y. Tax Law §184(4)(a). Thus, Section 184 now reaches all gross receipts of a motor carrier — including receipts from transportation neither originating in nor terminating in nor passing through New York — and apportions those gross receipts to New York by a fraction the numerator of which is the carrier's miles in New York State and the denominator of which is the carrier's total miles.

Appellants filed their challenge to the constitutionality of Section 184 as amended by Laws 1981, Ch. 486 in the New York Supreme Court for Albany County on December 17, 1981. That court upheld the tax on December 10, 1982, rejecting Appellants' argument that the tax was unconstitutional because it reached gross receipts having no nexus with New York. Indeed, the court denied that the tax reached such receipts at all. It based its decision on the theory that the *apportionment formula* separated Appellants' gross receipts into two

groups, one having nexus with New York and the other lacking such nexus. According to the court, therefore, the apportionment of the tax cured the constitutionally impermissible lack of nexus; *i.e.*, the apportionment mathematically created nexus where, in fact, there was none. Appellants appealed directly to the Court of Appeals, as permitted by New York Civil Practice Law and Rules Section 5601(b). On October 20, 1983, the Court of Appeals affirmed in a one-paragraph memorandum opinion relying on the opinion of the Supreme Court.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The questions in this case are substantial and merit plenary consideration for reasons closely related to those which this Court found compelling in *Armco v. Hardesty*, No. 83-297, *probable jurisdiction noted*, December 12, 1983. Even more than in *Armco*, although in a related context, the decision below is in square and irreconcilable conflict with decisions of this Court requiring a nexus between the taxing state and the transaction taxed and improperly extends the unitary business principle from net income taxes to a gross receipts tax.

First, the decision below conflicts with numerous decisions of this Court. In *Norton Co. v. Department of Revenue*, 340 U.S. 534 (1951), this Court held that transactions having no contact with the taxing state may not be taxed regardless of the extent of the taxpayer's unrelated contacts with the state. In *Canton Railroad v. Rogan*, 340 U.S. 511, 515 (1951), this Court held that a nondiscriminatory gross receipts tax can be valid only if "fairly apportioned to the business done within the taxing state and not reaching any activities carried on beyond the borders of the state." (Citation omitted; emphasis added.) Similarly, in *James v. Dravo Contracting Co.*, 302 U.S. 134, 138 (1937), this Court held that a state

may not impose a gross receipts tax "unless the activities which are the subject of the tax were carried on within the territorial limits of [the state]."

Second, the decision of the New York Court of Appeals, if affirmed by this Court, would revolutionize the fundamental Commerce Clause jurisprudence established by this Court. In *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), this Court promulgated a four-pronged test of the constitutional validity of state taxes on interstate commerce activities. The Court has reiterated and expanded this test in numerous subsequent cases and has clearly established that each of the four prongs must be separately met. In the decision appealed from, however, the Court of Appeals held that if a tax meets the test of being fairly apportioned, it need not satisfy the test of being limited to transactions or activities with which the taxing state has a nexus. Rather, the court held that such a tax may reach all activities of any *taxpayer* with which the state has nexus. In so holding, the Court of Appeals effectively eliminated the nexus prong from the test of *Complete Auto Transit*.

Third, the decision of the Court of Appeals improperly extends the unitary business principle — which determines the limits of nexus in the net income tax context — to gross receipts taxes. This Court has always drawn a clear distinction between net income and gross receipts taxes, *e.g.*, *United States Glue Co. v. Town of Oak Creek*, 247 U.S. 321, 328-29 (1918), and has heretofore confined the unitary business principle to the former. The role played by the unitary business principle in net income taxes was recently explored at length in *Container Corp. of America v. Franchise Tax Board*, 103 S. Ct. 2933 (1983), *ASARCO v. Idaho State Tax Commission*, 458 U.S. 307 (1982), and *F.W. Woolworth Co. v. Taxation & Revenue Department*, 458 U.S. 354 (1982). Those cases make clear that the reasons for the use of the principle in net income tax cases do not apply in a gross receipts tax context. *Cf. Armco v. Hardesty*, 303

S.E.2d 706 (W. Va.), *prob. juris. noted*, 52 U.S.L.W. 3460 (December 12, 1983).

1. The Commerce and Due Process Clauses Require a Nexus with the Transaction Taxed and Not Merely a Nexus with the Taxpayer.

The Due Process and Commerce Clauses obviously require a nexus between the taxing state and the taxpayer on which it seeks to impose a burden. *National Bellas Hess v. Department of Revenue*, 386 U.S. 753 (1967); *National Geographic Society v. California Board of Equalization*, 430 U.S. 551 (1977). However, the Due Process and Commerce Clauses also require, in addition to such a jurisdictional nexus, that state taxes be imposed only on *property* or *activities* bearing a relationship to the taxing state. *Container Corp. of America v. Franchise Tax Board*, 103 S. Ct. 2933 (1983); *ASARCO v. Idaho State Tax Commission*, 458 U.S. 307 (1982); *F.W. Woolworth Co. v. Taxation & Revenue Department*, 458 U.S. 354 (1982); *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 (1980). This mandatory nexus between the taxed property or activity and the taxing state must be distinguished from nexus conceived of as mere jurisdiction over the taxpayer — a state may have jurisdiction to tax a particular person or entity and yet be forbidden from taxing some of that person's or entity's property or activities for lack of the required nexus.²

2. All of the cited cases involved the question whether a taxing state could include in a corporate taxpayer's apportionable net income certain income received by the taxpayer out-of-state. In all cases, there was no question that the taxpayer did business in the taxing state and therefore that the required nexus between the state and the taxpayer, *i.e.*, nexus as jurisdiction to tax, existed. The question, rather, was whether there was sufficient nexus between the states and the activity that generated the income which they sought to tax. In *ASARCO* and *F.W. Woolworth*, the Court held that such nexus did not exist.

This Court has clearly held on numerous occasions that a gross receipts tax reaching receipts earned from activities beyond the borders of the taxing state is invalid. In *Norton Co. v. Department of Revenue*, 340 U.S. 534 (1951), for example, a Massachusetts manufacturer maintained a branch office in Illinois and made sales in Illinois both through its branch office and directly by mail or common carrier from Massachusetts. This Court held that an Illinois gross receipts tax could be imposed on the former class of transactions but not on the latter precisely because the latter transactions lacked nexus with Illinois. Similarly, in *James v. Dravo Contracting Co.*, 302 U.S. 134, 138 (1937) (striking down the attempted application of a gross receipts tax to activities having no nexus), the Court held that a state has no jurisdiction to impose a gross receipts tax "unless the activities which are the subject of the tax were carried on within the territorial limits of [the state]" even though the state does have jurisdiction over the corporate taxpayer. In *Canton Railroad v. Rogan*, 340 U.S. 511, 515 (1951) (upholding a gross receipts tax reaching only receipts having a nexus), the Court reaffirmed the rule that a nondiscriminatory gross receipts tax may be sustained only "if fairly apportioned to the business done within the taxing state and not reaching any activities carried on beyond the borders of the state." (Citation omitted.) See also *American Oil Co. v. Neill*, 380 U.S. 451 (1965); *Connecticut General Life Insurance Co. v. Johnson*, 303 U.S. 77 (1938). These cases all teach that activities having no contact whatever with the taxing state may not be taxed at all; activities taking place both within and without the state may be taxed provided there is fair apportionment.

As amended by Laws 1981, Ch. 486, the tax imposed by Section 184 reaches and burdens gross receipts that have no nexus with New York State. All of Appellants' gross receipts are included in the Section 184 tax base regardless of the geographical location of the trans-

portation from which such receipts arose. Stipulation of Facts, paragraph 7. Appellants Red Star, Fort Edward, Mushroom, Hallamore, and Maislin all had substantial gross receipts from transportation wholly outside New York, including (1) transportation in interstate commerce wholly outside New York; (2) transportation in intrastate commerce in states other than New York; (3) transportation in commerce between the United States and Canada or other foreign countries, which transportation took place wholly outside New York; and (4) transportation in domestic Canadian commerce. Stipulation of Facts, Paragraphs 8(b)(F); 8(c)(F); 8(d)(F); 8(f)(F); Affidavit of Franklin Seligman, Paragraph 3(f). The tax reaches all of these gross receipts and is therefore invalid under this Court's decisions in *Norton Co., Dravo Contracting Co.*, and *Canton Railroad*.

The court below held that the constitutional requirement for nexus is met because Section 184 provides for apportionment:

[W]hat the statute in substance does is to apportion gross receipts into two groups; those having a substantial nexus with the State of New York based upon actual revenue miles in the State of New York and those gross receipts derived wholly from external sources. Thus the New York statute taxes 100 percent of gross receipts based upon New York State revenue miles and does not in any way tax gross receipts based upon revenue miles in other states or countries.

Memorandum Opinion of Supreme Court (Appendix B) at 2 (page 7a hereof). However, this explanation flies directly in the face of the plain statutory language, which calls for taxation of an apportioned share of *all* gross receipts. This Court's cases require state taxes to be evaluated on their actual language and effect rather than on some abstract theory. Thus, in *Aloha Airlines v. Director of Taxation*, 104 S. Ct. 291 (1983), Hawaii argued that

its tax on airline gross receipts "really" fell not on the gross receipts but on the property of the taxpayers. This Court rejected the argument, holding that the state's characterization could not "mask the fact that the purpose and effect of the provision is to impose a levy upon the gross receipts of airlines." 104 S. Ct. at 295.³ Similarly, the tax here at issue clearly falls on all the gross receipts that enter the taxing formula. Moreover, as is shown in detail below, apportionment alone cannot substitute for nexus in solving the problems intended to be solved by the nexus requirement.

2. This Court's Cases Require That Each of the Four Tests of *Complete Auto Transit v. Brady* Must Be Met If a Tax on Interstate Commerce Is to Pass Constitutional Muster

In *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), this Court promulgated a four-pronged test which must be met by any state tax affecting interstate commerce if such a tax is to be constitutional. Each of the four prongs of the test must be met; if the tax fails any one, it is invalid. This case involves the first two of the four prongs — that the tax must be imposed on transactions or activities having a substantial nexus with the taxing state and that the tax must be fairly apportioned. The court below upheld the tax solely on the ground that it is apportioned (by mileage) to the taxpayer.

3. The New York courts have recently rejected the identical argument in connection with a companion challenge to Section 184 brought by the air transportation industry. In *Air Transport Association v. New York State Department of Taxation & Finance*, 91 A.D.2d 169, 458 N.Y.S.2d 709, *aff'd*, 59 N.Y.2d 917, 453 N.E.2d 548, 466 N.Y.S.2d 319, *cert. denied*, 104 S. Ct. 392 (1983), the state argued that the Section 184 tax was imposed not on gross receipts (and therefore preempted by 49 U.S.C. §1513) but on the privilege of doing business as measured by gross receipts. The New York courts rejected the argument, holding that the tax was, in accordance with its clear language, imposed on gross receipts.

ers' in-state activities and that the mileage method of apportionment is a constitutionally acceptable one.⁴ Thus, the court relied only on the second prong of *Complete Auto Transit* and held that an apportioned tax need not meet the nexus requirement. However, Appellants believe that the tax is unconstitutional not because it uses an unfair method of apportionment but because it seeks to apportion gross receipts that, because they lack a nexus with New York, may not be apportioned by any method.

The nexus prong and the apportionment prong must *each* be met in a constitutional tax because apportionment alone cannot solve the problems intended to be solved by the test of *Complete Auto Transit*. Apportionment by formula was designed to deal with situations in which more than one state has the constitutional right to tax a particular tax base. If all such states were permitted to impose a tax on the entire amount of such a base, interstate enterprises would be subjected to a multiple burden of taxation not suffered by comparable intrastate enterprises. Such a multiple burden is forbidden

4. The trial court cited *Railway Express Agency v. Virginia*, 358 U.S. 434 (1959), and *Maine v. Grand Trunk Railway*, 142 U.S. 217 (1891), as cases in which apportionment of non-nexus receipts was permitted. However, neither case is apposite. *Railway Express* involved a tax which, by its terms, applied only to gross receipts derived from transportation within, through, into, or out of the state of Virginia, *i.e.*, receipts having a nexus. 358 U.S. at 438. This Court upheld the application of the tax to the Railway Express Agency using a measure broader than that contained in the Virginia statute only because the taxpayer had refused to provide the state with information required to determine which of its receipts were properly taxable. *Grand Trunk Railway* did not consider the question of nexus. However, the record in that case shows that the tax there approved had almost certainly not been applied to gross receipts lacking a nexus with Maine. The Court of Appeals made special note in its Memorandum Opinion of the equitable apportionment provisions of Section 184(4)(f). However, Appellants contend not that the tax is unfairly apportioned but that it seeks to apportion receipts lacking a nexus with New York.

by the Commerce Clause. Accordingly, the states are constitutionally permitted to tax only an apportioned share of the interstate tax base. In theory each state then taxes only its own share of the base; all states together tax 100%; and interstate and intrastate businesses are subjected to equivalent burdens. In short, apportionment is a safeguard against multiple taxation.

But apportionment cannot protect against multiple taxation where non-nexus gross receipts are taxed. If a motor carrier engages solely in intrastate transportation in State A, for example, that state may (obviously) tax 100% of the gross receipts from such transportation. If the carrier now begins a new interstate operation between State A and State B, State A may not tax 100% of the new gross receipts (because State B may tax those gross receipts as well) but must apportion them. There can be no doubt, however, that the new operation has no effect on State A's right to tax 100% of the gross receipts from the old intrastate operation. State B, for its part, may tax an apportioned share of the new interstate gross receipts but may not tax any of the intrastate receipts in State A — for if State B were allowed to do so, those receipts would be subjected to multiple taxation.

Thus, if the apportionment principle is to succeed in its function of protecting against multiple taxation, only gross receipts having a nexus with the taxing state may be apportioned by that state. This Court has recently made the same point in the context of a property tax:

It is a commonplace of constitutional jurisprudence that multiple taxation may very well be offensive to the Commerce Clause. In order to prevent multiple taxation of interstate commerce, this Court has required that taxes be apportioned among taxing jurisdictions, so that no instrumentality of commerce is subjected to more than one tax on its full value. The corollary of the apportionment principle, of course, is that no jurisdiction may tax the instru-

mentality in full. . . . The basis for this Court's approval of apportioned property taxation, in other words, has been its ability to enforce full apportionment by all potential taxing bodies.

Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 446-47 (1979) (citations omitted). In *Japan Line*, the Court struck down an apportioned property tax, imposed by political subdivisions of the State of California, on certain shipping containers owned by corporations domiciled in Japan on the ground that the tax exposed the taxpayers to multiple taxation. The Court held that the apportionment provisions of the tax did not protect the taxpayers from multiple taxation because Japan could and did tax 100% of the value of the containers.

Two of Appellants, Hallamore and Maislin, have gross receipts from domestic Canadian commerce. Stipulation of Facts, Paragraph 8(f)(C) (Hallamore); Affidavit of Franklin Seligman, Paragraph 3(f) (Maislin). Four of Appellants, Red Star, Mushroom, Hallamore, and Maislin, have gross receipts from intrastate commerce in states other than New York. Stipulation of Facts, Paragraphs 8(b)(C) (Red Star); 8(d)(C) (Mushroom); 8(f)(C) (Hallamore); Affidavit of Franklin Seligman, Paragraph 3(f) (Maislin). Under the Act, New York imposes a tax on an apportioned share of all these receipts.

There can be no question that Canada can tax 100% of the gross receipts of Appellants from their domestic Canadian operations. Moreover, various states can — and some do — impose a tax on 100% of the gross receipts from intrastate commerce within their borders. Pennsylvania, for example, imposes a tax on the gross receipts of motor carriers which applies to 100% of such gross receipts from intrastate commerce.⁵ Appellant Maislin conducts intrastate commerce in Pennsylvania,

5. 72 P.S. 8101. Other states also impose such a tax. *E.g.*, W. Va. Code §11-12A-2 (West Virginia); Ariz. Rev. Stat. §40-641 (Arizona); Ind. Code §§6-2-1-2 and 6-2-1-7(q) (Indiana).

Affidavit of Franklin Seligman, Paragraph 3(f), and must pay this tax, as must other motor carriers which are members of the trade association Appellants. Yet, New York, under the Act, imposes a tax on an apportioned share of these same gross receipts. Accordingly, such taxpayers are exposed to taxation on more than 100% of these receipts. As a result, under the Commerce Clause and the holding of this Court in *Japan Line*, Section 184 is invalid and must be struck down.

3. New York May Not Tax an Apportioned Share of Appellants' Out-of-State Gross Receipts on the Ground That Appellants Are Conducting a Unitary Business

The drafters of the Act and the Legislature apparently believed that the extension of the Section 184 tax to all gross receipts regardless of nexus would be valid under the so-called unitary business principle, which permits a taxing state to tax an apportioned share of all *net income* earned by a unitary business regardless of the geographical location at which the income is earned. See, e.g., *Container Corp. of America v. Franchise Tax Board*, 103 S. Ct. 2933 (1983); *ASARCO v. Idaho State Tax Commission*, 458 U.S. 307 (1982); *F.W. Woolworth Co. v. Taxation & Revenue Department*, 458 U.S. 354 (1982); *Exxon Corp. v. Department of Revenue*, 447 U.S. 207 (1980); *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 (1980). However, while "the linchpin of apportionability in the field of state *income* taxation is the unitary business principle," *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. at 439 (emphasis added), the unitary business principle has no relevance with respect to a *gross receipts* tax.

This Court has long recognized the significant practical differences in general between a tax measured by net income and a tax measured by gross receipts:

The difference in effect between a tax measured by gross receipts and one measured by net in-

come, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large.

United States Glue Co. v. Town of Oak Creek, 247 U.S. 321, 328-29 (1918). Because of the fundamental differences between the two types of taxation, recognized by the Court in *United States Glue Co.*, the underlying justification for application of the unitary business principle to a net income tax does not apply to a gross receipts tax.

In the net income tax context, the only alternative to apportionment by formula of the entire net income of the unitary business is separate accounting for such income. In separate accounting, income is assigned to the various geographical subdivisions of a business by determining the receipts of the business from that geographical area and then subtracting the expenses attributable to those receipts. Such a procedure, however, is necessarily arbitrary because a multi-state business is "an organic system," *Wallace v. Hines*, 253 U.S. 66, 69 (1920) (Holmes, J.), whose income cannot sensibly be reduced to the sum of the hypothetical incomes of distinct component parts, the operations of which are confined to a single state:

For example, if the expenses incurred by a vertically integrated business in manufacturing a product in State A are deducted from the revenues generated by marketing the product in State B, the resulting net income cannot reasonably be allocated either entirely to State A or entirely to State B. See *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 120-21 (1920). Even when a state-by-state allocation superficially seems feasible, as in the case of a horizontally integrated, but loosely-knit chain of retail stores, "economies of scale" resulting from "functional integration" and "centralization of management," *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 438 (1980), may augment the net income earned by the whole to a value greater than the sum of what could be earned by each of the parts operating separately. See *Butler Bros v. McColgan*, 315 U.S. 501, 508-509 (1942). When this happens, the additional increment in income resulting from the combination cannot be allocated to any single one of the parts on other than an arbitrary basis. See e.g., *Adams Express Co. v. Ohio State Auditor*, 165 U.S. 194, 221 (1897) (a unitary enterprise has a "value resulting from the combination of the means by which the business [is] carried on [which] exist[s] . . . throughout the entire domain of [its] operation"). The net income of an organic, unitary business, in short, is indivisible.

ASARCO v. Idaho State Tax Commission, 458 U.S. 307, 333 n.1 (O'Connor, J., dissenting on other grounds).

Gross receipts, by contrast, are not indivisible. On the contrary, they may be fairly and accurately assigned on a geographical basis. Thus, in determining how to tax a portion of the *net income* of a multi-state corporation, states are faced with a choice between two methods which are both fundamentally artificial. In determining

how to tax a portion of the *gross receipts* of such a corporation, however, the choice is between a fiction—apportionment by formula—and a truth—geographical assignment.

In this regard, gross receipts are similar to sales.⁶ No one would contend that a state could impose a sales tax based upon an apportioned share of a multi-state retailer's nationwide sales without violating the Constitution. Rather, a sales tax must be confined in its operation to sales having a nexus with the taxing state. In *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327 (1944), for example, the Court struck down, as violative of the Commerce Clause, an Arkansas sales tax as applied to sales that had no nexus with Arkansas even though the purchasers were Arkansas citizens. No state ever has attempted to impose an "apportioned" sales tax reaching sales that had no nexus with the taxing state, because such a tax would clearly be invalid. The tax imposed by Section 184 is equally improper.

6. The tax involved in *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), was actually a sales tax. In many cases, a sales tax and a gross receipts tax are indistinguishable. Neither may reach sales or receipts lacking a nexus with the taxing state.

CONCLUSION

For the foregoing reasons this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

Bernard G. Segal

Counsel of Record

Ralph S. Snyder

James D. Crawford

Richard D. Birns

Attorneys for Appellants

SCHNADER, HARRISON, SEGAL & LEWIS

Suite 3600, 1600 Market Street

Philadelphia, Pennsylvania 19103

Of Counsel.

Dated: January 18, 1984

APPENDICES

APPENDIX A

Memorandum Opinion of the Court of Appeals of New York

**STATE OF NEW YORK
COURT OF APPEALS**

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,
Appellants,

v.

NEW YORK STATE TAX COMMISSION, et al.,
Respondents.

Ralph S. Snyder, Philadelphia, pro hac vice, Herbert Burstein, NY City, & Richard D. Birns, Philadelphia, for appellants.

Robert Abrams, Attorney General (Francis V. Dow & Peter H. Schiff of counsel) for respondents.

MEMORANDUM.

The judgment of Supreme Court, Albany County, should be affirmed for the reasons stated in the memorandum of former Justice DeForest C. Pitt at Special Term (120 Misc 2d 191). We would only add that the subject tax law empowers the tax commission to adjust the allocation formula with respect to a particular corporation to "fairly and equitably reflect gross earnings from all sources within this state" (Tax Law, §184, subd 4, par [f]).

* * *

Chief Judge Cooke and Judges Jasen, Jones, Wachtler, Meyer, Simons and Kaye concur.

Judgment affirmed, with costs, in a memorandum.

Decided October 20, 1983

APPENDIX B

**Judgment of the Supreme Court of New York for Albany
County on Remand from the Court of Appeals**

**STATE OF NEW YORK
SUPREME COURT — ALBANY COUNTY**

AMERICAN TRUCKING ASSOCIATIONS, :	
INC., et al., :	
<i>Plaintiffs-Appellants,</i> :	<i>Judgment</i>
-against- :	<i>Index No.</i>
NEW YORK STATE TAX COMMISSION, :	
et al., :	12057/81
<i>Defendants-Respondents.</i> :	

The Plaintiffs-Appellants herein, represented by Zelby and Burstein, Esqs. 387 Park Avenue South, New York, New York, 10016 and Schnader, Harrison, Segal and Lewis, Esqs., 1719 Packard Building, Philadelphia, Pennsylvania, 19102, having appealed to the Court of Appeals of the State of New York from a judgment of the Supreme Court, Albany County, entered December 14, 1982, which denied plaintiff's motion for summary judgment and granted defendant's cross-motion for summary judgment dismissing the complaint upon the ground that the Tax Law Section 184 is a constitutional statute, and the Court of Appeals, after due deliberation, having rendered a decision on the 20th day of October, 1983, ordering that the judgment so appealed from be affirmed, with costs, the Remittitur from the Court of Appeals having been filed in the office of the Clerk of Albany County, it is hereby

ADJUDGED, that the aforesaid judgment of the Supreme Court, Albany County be, and the same hereby is affirmed, with costs of \$240.00 to be taxed against the Appellants, in favor of Respondents, and that the Respondents have execution thereon.

/s/ MARIE A. REILLY

Deputy Clerk

Dated and Entered: November 2, 1983

APPENDIX C

**Judgment and Opinion of the Supreme Court
for Albany County**

At a Special Term of the Supreme Court of the State of New York, held in and for the County of Albany, at the Albany County Courthouse, Albany, New York on the 5th day of November, 1982.

P R E S E N T :

HONORABLE DEFOREST C. PITT
Justice of the Supreme Court

American Trucking Associations, Inc., :
New York State Motor Truck Association, Inc., New York State :
Movers' and Warehousemen's :
Association, Inc., Fort Edward :
Express Company, Inc., Hallamore :
Motor Transportation, Inc., :
Maislin Transport of Delaware, Inc., :
Mushroom Transportation Company, :
Red Star Express Lines of Auburn, :
Inc., Shay's Service, Inc., and :
Teal's Express, Inc., :

Plaintiffs, : Judgment

-against-

: INDEX NO.
12057/81

New York State Tax Commission, :
James H. Tully, Jr., Thomas H. Lynch :
and Francis Koenig, Members of the :
New York State Tax Commission, :
and Robert Abrams, Attorney General :
of the State of New York, :

Defendants.

Plaintiffs having commenced this action for declaratory judgment, *inter alia*, declaring Tax Law Section 184 unconstitutional and by service of a notice of motion dated September 21, 1982 and supporting papers having moved for summary judgment pursuant to CPLR 3212,

NOW upon reading the summons and amended complaint herein, the stipulation of facts dated September 8, 1982 and the affidavits of Franklin K. Seligman, sworn to the 8th day of September, 1982, Douglas A. Hughes, sworn to the 10th day of September, 1982, John Teal, sworn to the 5th day of August, 1982, Albert T. DeRoose, sworn to the 4th day of August, 1982, J. Fred Relyea, sworn to the 4th day of August, 1982, Walter Lopez, sworn to the 4th day of August, 1982, John Leyden, sworn to the 5th day of August, 1982, John Daley, sworn to the 5th day of August, 1982, the defendants' answer to the amended complaint and the defendants' notice of cross-motion dated October 18, 1982 and the affidavit of Lawrence L. Doolittle, sworn to the 18th day of October, 1982, and the matter having come on to be heard at the above-mentioned Term of this Court and after hearing Zelby and Burstein, Esqs. and Schnader, Harrison, Segal and Lewis, Esqs., attorneys for the plaintiffs (Herbert Burstein and Ralph S. Snyder, of counsel) in support of the motion and Robert Abrams, Attorney General of the State of New York, attorney for the defendants (Lawrence L. Doolittle, of counsel) in opposition thereto and due deliberation having been had thereon and the Court having rendered a decision thereon dated December 1, 1982, a copy of which is annexed hereto, it is

ORDERED, ADJUDGED AND DECREED, that plaintiffs motion be and hereby is in all respects denied, and it is further

ORDERED, ADJUDGED AND DECREED, that the defendants' cross-motion for summary judgment declaring Section 184 of the Tax Law constitutional be and hereby is in all respects granted, and it is further

5a

ORDERED, ADJUDGED AND DECLARED, that
Tax Law Section 184 is in all respects constitutional.

DATED: Troy, New York
December 10, 1982

/s/ DEFOREST C. PITT
Justice of the Supreme Court

STATE OF NEW YORK
SUPREME COURT—COUNTY OF ALBANY

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,
Plaintiffs,
-against-
NEW YORK STATE TAX COMMISSION, et al.,
Defendants.

Appearances: Zelby and Burstein, Esqs., and Schnader,
Harrison, Segal & Lewis, Esqs., Attorneys for Plain-
tiffs.

(Herbert Burstein, Ralph S. Snyder & Richard D.
Birns, Esqs., of Counsel.)

Robert Abrams, Attorney General, State of New York,
Attorney for Defendants.

(Lawrence L. Doolittle, Asst. Atty. Gen., of Counsel)

MEMORANDUM

PITT, J.

The plaintiffs have brought an action for a declaratory judgment declaring section 184 of the New York State Tax Law unconstitutional, granting a permanent injunction restraining the defendants from enforcing said section and granting reasonable attorneys' fees. The plaintiffs have moved for summary judgment for the relief demanded in the complaint on the grounds that there are no defenses to the cause of action and that no factual issues exist. The defendants have cross-moved for summary judgment declaring section 184 of the Tax Law constitutional.

Section 184 of the Tax Law levies a franchise tax upon trucking carriers in the amount of three quarters of one percent of a percentage of the trucking companies'

gross receipts from all sources. This percentage uses New York State revenue miles as the numerator and total revenue miles as the denominator. The plaintiffs contend that this tax is in violation of all four prongs of the test of taxing statutes set forth in *Complete Auto Transit Inc. v. Brady*, (430 U.S. 274). *Complete Auto Transit* required (1) that the taxed activity must have a substantial nexus with the taxing state; (2) that the tax does not discriminate against interstate commerce; (3) that the tax is fairly apportioned and (4) that the tax is fairly related to services provided by the state, (430 U.S. 274, 279). The Court does not find any of these arguments persuasive.

The plaintiffs argue that the taxing formula set forth in section 184 of the Tax Law taxes gross receipts having no nexus with the State of New York. This argument places form over substance as in the era of *Spector Motor Service v. O'Connor*, (340 U.S. 602). The plaintiffs argue that the New York State Tax taxes a percentage of gross receipts derived from activity carried on beyond the borders of the State and refrains from taxing fully activities carried on within the State on the ground that the statute taxes a percentage of all gross receipts from all sources. However, what the statute in substance does is to apportion gross receipts into two groups; those having a substantial nexus with the State of New York based upon actual revenue miles in the State of New York and those gross receipts derived wholly from external sources. Thus the New York statute taxes 100 percent of gross receipts based upon New York State revenue miles and does not in any way tax gross receipts based upon revenue miles in other states or countries. Mileage apportionment of revenues has long been upheld as a permissible measure of taxation and in fact has been extended to taxing statutes using a formula of miles in-state divided by miles out-of-state times gross receipts from all sources. *Railway Exp. Agency Inc. v. Com. of Va.*, (358 U.S. 434), upheld a formula which

used miles in the State of Virginia over miles in all other states times all gross receipts. While the case involved a taxpayer's failure to file complete information on in-state activities, the case does not include any words strictly limiting its holding to such situations. Clearly a taxpayer's failure to file certain information could not validate a tax which was unconstitutional in principle. Instead the Court must look to the substance of the tax.

Even where taxpayers have attempted to show through evidence, as this appellant has not, that a given apportionment formula effected an appropriation of more than that to which the State was entitled, this Court has required " 'clear and cogent evidence' that it results in extra territorial values being taxed." page 444.

A mathematically identical formula was upheld in *Maine v. Grand Trunk Ry. Co. of Canada*, (142 U.S. 217). That case provided for a franchise tax measured by average gross receipts per mile for the entire railway system both in and out-of-state times in-state miles.

While the plaintiff has mentioned the possibility that the New York State taxing apportionment formula might lead to distortions in taxes due based upon different receipts for different types of goods carried, the plaintiffs have totally failed to make any factual showing that such distortions do in fact, occur. Furthermore, section 184(4)(f) of the Tax Law provides that if such distortions do occur the Tax Commission shall prescribe methods of allocation or apportionment which fairly and equitably reflect gross earnings from all sources within the State. It is therefore the determination of this Court that section 184 of the Tax Law does not tax the plaintiffs on gross receipts having no nexus with the State of New York.

The plaintiffs have also argued that the taxing statute violates the Commerce Clause and the Equal Protection Clause of the Fourteenth Amendment because the

tax is not fairly related to services rendered by the State. The plaintiffs contend that because some of the funds generated by the tax are earmarked for the Metropolitan Transit Authority and because many of the plaintiffs are never present in the MTA area, that the tax is not related to the services rendered. This argument involves a basic misunderstanding of the test set forth in *Complete Auto Transit*. As stated in *Commonwealth Edison Co. v. Montana*, (453 U.S. 609), the amount of tax does not need to cover just those special services rendered by the State to the individual taxpayer. Instead the test, which requires that the tax be fairly related to services rendered by the State, means "the *measure* of the tax must be reasonably related to the extent of the contact." Thus a tax measured as a percentage of the value of coal taken from the State was permissible even though such percentage was as high as thirty percent. In the instant case the tax is measured as a percentage of the value of services rendered in the State of New York in the form of three quarters of one percent of gross receipts for such services. This clearly complies with the test that the measure of the tax be related to the extent of contact with the state. Furthermore, there is no requirement that the State use the proceeds of the tax for any specific purpose nor any proscription to the levy of more than one tax based upon highway use, (*Aero Mayflower Transit Co. v. Board of R.R. Com'rs of State of Mont.*, 332 U.S. 495). It is therefore the determination of this Court that the statute is fairly related to services rendered by the State of New York, including the building and maintenance of highways, police and fire protection and reduced traffic congestion in general due to mass transit.

The plaintiffs argue that the statute violates the commerce clause in that it discriminates against interstate commerce because it is directed against industries necessarily engaged in interstate commerce and because it exposes such industries to multiple taxation. The issue of multiple taxation has already been dis-

cussed in that it has been determined that the statute does not levy any tax upon gross receipts derived from out-of-state sources. The argument that the statute is invalid because it discriminates against interstate commerce was dismissed in *Commonwealth Edison Company v. Montana*, (supra). In that case Montana levied a thirty percent severance tax upon the contract sale price of all coal even though ninety percent of Montana coal was exported to other States. The Court found no discrimination because "the Montana tax is computed at the same rate regardless of the final destination of the coal", (453 U.S. 609, 618). It is therefore the determination of this Court that the statute does not discriminate against interstate commerce.

The plaintiffs have also argued that the statute violates the Equal Protection Clause of the Fourteenth Amendment because it imposes a more burdensome tax on motor carriers than upon others with no rational justification. As has already been stated, it is permissible for a state to levy more than one tax based upon highway usage, (*Aero Mayflower*, supra, at 506, 507). The Court takes judicial notice of the fact that motor carriers receive substantial benefits from the State through the use of its highway system, thus increasing the costs to the State for highway maintenance, traffic regulation and enforcement and other related costs. Such services rendered by the State of New York exceed general services rendered to other businesses. The plaintiffs have failed to provide any evidence that the highway use taxes and gasoline taxes cover all expenses incurred by the State directly related to highway truck traffic. However, even such proof would not require a finding that the statute is unconstitutional, (*Commonwealth Edison Company*, supra; *Aero Mayflower*, supra). It is therefore the determination of this Court that the possibility of an increased tax burden upon the plaintiffs has a rational justification.

The plaintiffs have failed to meet the burden of proof of showing that section 184 of the Tax Law is unconstitutional beyond a reasonable doubt. The defendants' cross-motion for summary judgment declaring section 184 of the Tax Law constitutional is therefore granted in all respects.

Submit order.

Dated: Troy, N.Y.

December 1, 1982.

APPENDIX D

Notice of Appeal

**STATE OF NEW YORK
COURT OF APPEALS**

AMERICAN TRUCKING ASSOCIATIONS, :
INC., NEW YORK STATE MOTOR TRUCK :
ASSOCIATION, INC., NEW YORK STATE :
MOVERS' AND WAREHOUSEMEN'S :
ASSOCIATION, INC., FORT EDWARD :
EXPRESS CO., HALLAMORE MOTOR :
TRANSPORTATION, INC., MAISLIN :
TRANSPORT OF DELAWARE, INC., :
MUSHROOM TRANSPORTATION CO., RED :
STAR EXPRESS LINES OF AUBURN, INC., :
SHAY'S SERVICE, INC., AND TEAL'S :
EXPRESS, INC., :

Appellants, :

v. :

NEW YORK STATE TAX COMMISSION, :
JAMES H. TULLY, JR., THOMAS H. :
LYNCH, AND FRANCIS KOENIG, :
Members of the New York State :
Tax Commission, and ROBERT ABRAMS, :
Attorney General of the State of :
New York, :

Appellees. :

**NOTICE OF APPEAL TO THE SUPREME
COURT OF THE UNITED STATES**

Notice is hereby given that American Trucking
Associations, Inc., New York State Motor Truck Asso-

ciation, Inc., New York State Movers' and Warehousemen's Association, Inc., Fort Edward Express Company, Inc., Hallamore Motor Transportation, Inc., Maislin Transport of Delaware, Inc., Mushroom Transportation Company, Red Star Express Lines of Auburn, Inc., Shay's Service, Inc., and Teal's Express, Inc. appeal to the Supreme Court of the United States from the Final Order of the Court of Appeals of New York, entered in this proceeding on October 20, 1983, affirming the judgment of the Supreme Court of the State of New York for Albany County entered December 10, 1982.

A copy of this Notice will also be filed in the Supreme Court for Albany County, inasmuch as the record has been returned from this Court to the Supreme Court.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

Respectfully submitted,

/s/ RALPH S. SNYDER

Bernard G. Segal

Ralph S. Snyder

James D. Crawford

Richard D. Birns

Suite 3600

1600 Market Street

Philadelphia, PA 19103

(215) 751-2222

Attorneys for Appellants

Of Counsel:

SCHNADER, HARRISON, SEGAL & LEWIS

Suite 3600

1600 Market Street

Philadelphia, Pennsylvania 19103

Dated: January 12, 1984

AFFIDAVIT OF SERVICE

COMMONWEALTH OF PENNSYLVANIA :
 : ss.
 COUNTY OF PHILADELPHIA :

I, Richard D. Birns, being duly sworn, hereby affirm and certify that I am not a party to this action, am over eighteen years of age, and have an office at Suite 3600, 1600 Market Street, Philadelphia, Pennsylvania 19103. Service of the foregoing Notice of Appeal to the Supreme Court of the United States was made on the only party required to be served by mailing a true copy thereof to Respondents' attorneys, Robert Abrams, Attorney General of the State of New York and Francis V. Dow, Assistant Attorney General, by depositing, this 12th day of January 1984, copies in the regular United States Mail, postage prepaid, addressed as follows:

The Honorable Robert Abrams
 Attorney General
 State of New York
 The Capitol
 Albany, New York 12224

Francis V. Dow, Esquire
 Assistant Attorney General
 Justice Building
 Albany, New York 12224

/s/ RICHARD D. BIRNS
 Richard D. Birns

Sworn to and subscribed
 before me this 12th day
 of January 1984.

/s/ MARY G. DONOHUE
 Notary Public
 My Commission Expires: Aug. 10, 1985

APPENDIX E

Designation of Corporate Relationships

American Trucking Associations, Inc., New York State Motor Truck Association, Inc., New York State Movers' and Warehousemen's Association, Inc., Fort Edward Express Co., Hallamore Motor Transportation, Inc., Maislin Transport of Delaware, Inc., Mushroom Transportation Co., Red Star Express Lines of Auburn, Inc., Shay's Service, Inc., and Teal's Express, Inc., filing this Jurisdictional Statement as Appellants in this proceeding, state that:

The following are their original Designations of Corporate Relationships:

American Trucking Associations, Inc.

American Trucking Associations, Inc., ("ATA"), is the national trade association of the motor carrier industry. It is made up of fifty-one federated motor truck associations representing the fifty states and the District of Columbia. In addition, its membership includes twelve individual conferences representing specialized segments of the motor carrier industry. ATA is organized as a District of Columbia nonprofit corporation. It is not owned by any parent corporation nor has it an ownership interest in any subsidiaries with the exception of one wholly-owned subsidiary. It does not have any affiliates.

New York State Motor Truck Association, Inc.

The New York State Motor Truck Association, Inc., is the trade association of the motor carrier industry in New York State. It is organized as a New York nonprofit corporation. It is not owned by any parent corporation, nor has it an ownership interest in any subsidiaries, nor does it have any affiliates.

New York State Movers' and Warehousemen's Association, Inc.

The New York State Movers' and Warehousemen's Association, Inc., is the trade association of the household goods moving industry in New York State. It is or-

ganized as a New York nonprofit corporation. It is not owned by any parent corporation, nor has it an ownership interest in any subsidiaries, nor does it have any affiliates.

Fort Edward Express Co.

100% of the stock of Fort Edward Express Co. is owned by 4-H Transportation Co., Inc.

Fort Edward Express Co. does not have an ownership interest in any subsidiaries.

Fort Edward Express Co. is affiliated with Hillman Properties, Inc.

Hallamore Motor Transportation, Inc.

Hallamore Motor Transportation, Inc., is not owned by any parent corporation.

Hallamore Motor Transportation, Inc., does not have an ownership interest in any subsidiaries other than wholly-owned subsidiaries.

Hallamore Motor Transportation, Inc., is affiliated with Brockton Rental Service, Inc. and Kennebec Crane Corp.

Maislin Transport of Delaware, Inc.

100% of the stock of Maislin Transport of Delaware, Inc. ("Maislin"), is owned by Maislin Transport Ltd. 100% of the stock of Maislin Transport Ltd., in turn, is owned by Maislin Industries Ltd.

Maislin has an ownership interest in Champlain Warehouse & Distribution, Inc. Maislin does not have an ownership interest in any other subsidiaries other than wholly-owned subsidiaries.

Maislin is affiliated with the following corporations:

Ace Trucking, Inc.

Argosy Carriers Ltd.

Contract Truckers, Inc.

Granby Express, Inc.

LaSalle Industrial Development Corporation

Location de Vehicules Valleyfield, Inc.

M.I.L. Investments Ltd.

Maislin Industries U.S., Inc.
 MIL Consultants, Inc.
 Moble Factor Corp.
 Port Express International, Inc.
 Societe des Investissements Maislin, Inc.
 Term Leasing Corp.
 Toronto Sufferance Truck Terminal Limited.

Mushroom Transportation Co.

Mushroom Transportation Co. is not owned by any parent corporation.

Mushroom Transportation Co. does not have an ownership interest in any subsidiaries other than wholly-owned subsidiaries.

Mushroom Transportation Co. is affiliated with Penn York Realty Co., Inc., Robbey Realty, Inc., and Leazit, Inc.

Red Star Express Lines of Auburn, Inc.

Red Star Express Lines of Auburn, Inc. ("Red Star"), is not owned by any parent corporation.

Red Star does not have an ownership interest in any subsidiaries other than wholly-owned subsidiaries.

Red Star is affiliated with J.B. Purchasing Corporation.

Shay's Service, Inc.

Shay's Service, Inc., is not owned by any parent corporation.

Shay's Service, Inc., does not have an ownership interest in any subsidiaries.

Shay's Service, Inc., is affiliated with Shay Trucks, Inc.

Teal's Express, Inc.

Teal's Express, Inc., is not owned by any parent corporation.

Teal's Express, Inc., does not have an ownership interest in any subsidiaries.

Teal's Express, Inc., does not have any affiliates.

DATED: January 18, 1984.

APPENDIX F

Constitutional And Statutory Provisions

United States Constitution, Article I, Section 8, Clause 3
(the "Commerce Clause"):

The Congress shall have power . . . To regulate commerce with foreign nations, and among the several states, and with Indian tribes.

United States Constitution, Fourteenth Amendment
(the "Due Process Clause"):

[N]or shall any state deprive any person of life, liberty, or property, without due process of law

New York Laws 1981, Chapter 486:

Chapter 486

TAXATION—EXEMPTIONS AND EXCLUSIONS—REPEALER

AN ACT to amend the tax law, in relation to jurisdiction to impose taxes under section one hundred eighty-three and one hundred eighty-four of such law and the elimination in the measure of the exclusion of receipts of an interstate character and the allocation of gross earnings under section one hundred eighty-four and the deposit of moneys collected from taxes imposed by sections one hundred eighty-three and one hundred eighty-four and making an appropriation for the support of mass transit and to repeal section three of such law relating to the exemption from certain taxes granted to certain corporations engaged in the operation of vessels or aircraft in foreign commerce

Approved July 11, 1981, effective as provided in § 11.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

§ 6. Subdivision one of section one hundred eighty-four of such law, § 6 as amended by chapter seventy of the laws of nineteen hundred seventy-one, is amended to read as follows:

1. Every corporation, joint-stock company or association formed for or principally engaged in the conduct of aviation, surface railroad, whether or not operated by steam, subway railroad, elevated railroad, canal, steamboat, ferry (except a ferry company operating between any of the boroughs of the city of New York under a lease granted by the city), express, navigation, pipe line, transfer, baggage express, omnibus, trucking, taxicab, telegraph, telephone, palace car or sleeping car business, or formed for or principally engaged in the conduct of two or more of such businesses and every other corporation, joint-stock company or association formed for or principally engaged in the conduct of a transportation or transmission business not liable to taxation under section one hundred eighty-six of this chapter, [shall pay] for the privilege of exercising its corporate franchise, or [carrying on its] of doing business, or of employing capital, or of owning or leasing property in this state in [such] a corporate or organized capacity [in this state, an excise], or maintaining an office in this state, shall pay a franchise tax [or license fee] which shall be equal to three-quarters of one per centum upon its gross earnings from all sources within this state[, excluding earnings derived from business of an interstate character. Provided, however, gross earnings from transportation or transmission business both originating and terminating within this state and traversing both this state and another state or states or country shall be subject to

Note: Matter underlined is new; matter in brackets [] is old law to be deleted.

the excise tax or license fee imposed by this section and such earnings shall be allocated to this state in the same ratio that the mileage within the state bears to the total mileage of such business. A corporation which has made an election under paragraph three of section seven hundred nine of this chapter shall include as part of its gross earnings under this section, without the exclusion provided herein, the gross earnings required to be included under the provisions of such paragraph].

§ 7. Subdivision two of section one hundred eighty-four of such law, as amended by chapter eight hundred thirty-six of the laws of nineteen hundred seventy-four, is amended to read as follows:

2. During the period that the state tax on motor fuel, computed without regard to any reimbursement allowable under paragraph (d) of subdivision three of section two hundred eighty-nine-c of this chapter, exceeds two cents per gallon the corporations herein classed as "taxicab" and "omnibus" shall be taxed [by the state on their franchises] under the provisions of article nine-a of the tax law and as other business corporations are taxed and not upon their gross receipts.

§ 8. Section one hundred eighty-four of such law is amended by adding a new subdivision four to read as follows:

4. Allocation of gross earnings from transportation and transmission services.— (a) General. A transportation or transmission corporation shall determine its gross earnings from transportation and transmission services within this state (except as otherwise provided for in this subdivision) by multiplying its gross earnings from transportation and transmission within and without the state by a fraction, the numerator of which is the taxpayer's mileage within this state and the denominator of which is

the taxpayer's mileage within and without this state during the period covered by the report or reports required by this chapter.

(b) Aviation corporations. An aviation corporation shall determine its gross earnings from transportation services within this state by multiplying its gross earnings from transportation services within and without this state by the arithmetical average of three ratios based on arrivals and departures, revenue tons handled and originating revenues during the period covered by the report or reports required by this chapter:

(i) the ratio which the aircraft arrivals and departures within this state by any such corporation during the preceding calendar year bear to the total aircraft arrivals and departures within and without this state during the same period; provided, however, arrivals and departures solely for maintenance or repair, refueling (where no debarkation or embarkation of traffic occurs), arrivals and departures of ferry and personnel training flights or arrivals and departures in the event of emergency situations shall not be included in such arrival and departure ratio; provided, further, the state tax commission may also exempt from such ratio aircraft arrivals and departures of all non-revenue flights including flights involving the transportation of officers or employees receiving air transportation to perform maintenance or repair services or where such officers or employees are transported in conjunction with an emergency situation or the investigation of an air disaster (other than on a scheduled flight); provided, however, that arrivals and departures of flights transporting officers and employees receiving air transportation for purposes other than specified above (without regard to remuneration) shall be included in computing such arrival and departure ratio;

(ii) the ratio which the revenue tons handled by such corporation at airports within the state during the preceding calendar year bears to the total revenue tons handled by it at airports within and without this state during the same period; and

(iii) the ratio which such corporation's originating revenue within this state for the preceding calendar year bears to its total originating revenue within and without this state for the same period. As used in this section the term "aircraft arrivals and departures" means the number of landings and takeoffs of the aircraft of an aviation corporation, and the number of air pickups and deliveries by the aircraft of such corporation; the term "originating revenue" means revenue to any such corporation from the transportation of revenue passengers and revenue property first received by such corporation either as originating or connecting traffic at airports and the term "revenue tons handled" by any such corporation at an airport means the weight in tons, of revenue passengers (at two hundred pounds per passenger) and revenue cargo first received either as originating or connecting traffic or finally discharged by such corporation at such airport.

(c) Corporations engaged in the operation of vessels. A corporation principally engaged in the operation of vessels shall determine its gross earnings from transportation services within this state during the period covered by the report or reports required by this chapter by multiplying its gross earnings from transportation services within and without this state by a percentage which represents the ratio of the aggregate number of working days of the vessels it owns or leases in all navigable lakes, rivers, streams and waters within this state and in New York territorial waters to the aggregate number of working days of all the vessels it owns or leases during such period.

(d) Telephone and telegraph corporations. A telephone or telegraph corporation shall determine its gross earnings from transmission services within this state during the period covered by the report or reports required by this chapter by totaling its gross operating revenue from transmission services performed wholly within this state plus the portion of revenue from interstate and foreign transmission service attributable to this state during such report period.

(e) All other gross earnings, if any, shall be allocated to this state in the manner prescribed by rules and regulations promulgated by the tax commission.

(f) With respect to other types of transportation and transmission corporations or where the tax commission decides that with respect to a certain corporation the method prescribed above does not fairly and equitably reflect gross earnings from all sources within this state, the tax commission shall prescribe methods of allocation or apportionment which fairly and equitably reflect gross earnings from all sources within this state. Also, the tax commission may, in order to properly reflect gross earnings, determine the report period in which any item of gross earnings shall be included without regard to the method of accounting employed by a corporation taxable hereunder.

No. 83-1196

Office - Supreme Court, U.S.

FILED

FEB 15 1984

ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

October Term, 1983

AMERICAN TRUCKING ASSOCIATIONS, INC., NEW YORK STATE
MOTOR TRUCK ASSOCIATION, INC., NEW YORK STATE
MOVERS' AND WAREHOUSEMEN'S ASSOCIATION, INC.,
FORT EDWARD EXPRESS CO., HALLAMORE MOTOR
TRANSPORTATION, INC., MAISLIN TRANSPORT OF DELA-
WARE, INC., MUSHROOM TRANSPORTATION CO., RED STAR
EXPRESS LINES OF AUBURN, INC., SHAY'S SERVICE, INC.
and TEAL'S EXPRESS, INC.,

Appellants,

against

NEW YORK STATE TAX COMMISSION, JAMES H. TULLY, JR.,
THOMAS H. LYNCH, and FRANCIS KOENIG, Members of the
New York State Tax Commission, and ROBERT ABRAMS, At-
torney General of the State of New York,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MOTION TO DISMISS OR AFFIRM

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Dated: February 13, 1984

Question Involved.

Whether the New York Court of Appeals correctly held that New York Tax Law, §184, which imposes a franchise tax on corporations principally engaged in a trucking business and others, measured by their gross earnings from all sources within the State determined by multiplying their gross earnings by a fraction, the numerator of which is their mileage within the State and the denominator is their mileage within and without the State, and provides that if that method of allocation does not equitably reflect gross earnings within the State with respect to certain corporations the State Tax Commission shall prescribe methods which fairly and equitably reflect gross earnings from all sources within the State, taxes only those earnings from activities which have a substantial nexus with the State and which are fairly apportioned.

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No. 83-1196

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

AMERICAN TRUCKING ASSOCIATIONS, Inc., NEW YORK
STATE MOTOR TRUCK ASSOCIATION, Inc., NEW YORK
STATE MOVERS' AND WAREHOUSEMEN'S ASSOCIA-
TION, Inc., FORT EDWARD EXPRESS CO.,
HALLAMORE MOTOR TRANSPORTATION, Inc.,
MAISLIN TRANSPORT OF DELAWARE, Inc.,
MUSHROOM TRANSPORTATION CO., RED STAR EX-
PRESS LINES OF AUBURN, Inc., SHAY'S SERVICE, Inc.,
and TEAL'S EXPRESS, Inc.,

Appellants,

against

NEW YORK STATE TAX COMMISSION, JAMES H. TULLY,
Jr., THOMAS H. LYNCH, and FRANCIS KOENIG,
Members of the New York State Tax Commission, and
ROBERT ABRAMS, Attorney General of the State of
New York,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF
THE STATE OF NEW YORK.

MOTION TO DISMISS OR AFFIRM.

The appellees move the Court to dismiss the appeal on the ground that it is manifestly evident that this case presents no substantial Federal question. This appeal is

from an order of the Court of Appeals of the State of New York, entered on October 20, 1983 which unanimously affirmed a judgment of the New York Supreme Court at Special Term in Albany County dated December 10, 1982.

The opinion of the New York Court of Appeals, dated October 20, 1983 is reported at 60 NY2d 745 and is reprinted in the appellants' appendix (App) to its jurisdictional statement at page 1a. The unpublished order of the New York Court of Appeals appears in the addendum to this brief at page A1. The decision of the New York Supreme Court dated December 1, 1982 is reported at 120 Misc 2d 191; 467 NYS2d 744 (1982) and is reprinted at App 6a-11a. The unpublished judgment of New York Supreme Court appears at App 3a-5a.

Relief Requested.

This Court should dismiss the appeal on the ground that it does not present a substantial Federal question. Alternatively, this Court should affirm for the reasons expressed by the New York State Court of Appeals below.

Constitutional and Statutory Provisions.

Commerce Clause (Article I, section 8, clause 3) and Due Process Clause (Amendment XIV) of the United States Constitution.

New York Tax Law, § 184, as amended by chapter 481 of the 1981 Laws of New York.

These constitutional and statutory provisions are reproduced in pertinent part in the addendum to this brief.

Statement of the Case.

The appellants are three trade associations and seven corporations principally engaged in the trucking business. One hundred percent of the transportation activities of two of the corporations occurs in New York State, three of the transportation corporations engage in transportation activities in New York State and also do an interstate business. Two companies engage in the trucking business in New York State, do interstate trucking business and also do business in Canada. All of the corporations are subject to the franchise tax imposed by New York Tax Law, § 184, as amended in 1981, which is measured by gross earnings from all sources in New York State.

In the New York Court of Appeals and Supreme Court the appellants challenged § 184 only insofar as it related to gross earnings from transportation services and not those earnings from items such as interest, dividends, rentals, repairs and storage. The challenged tax is a franchise tax on a corporation "which shall be equal to three-quarters of one per centum upon its gross earnings from all sources within this state." A trucking corporation "shall determine its gross earnings from transportation * * * within this state by multiplying its gross earnings from transportation * * * within and without the state by a fraction, the numerator of which is the taxpayer's mileage within this state and the denominator of which is the taxpayer's mileage within and without this state * * *."

As interpreted by the New York Tax Commission "mileage" in the context of the above-stated provision means actual revenue miles for purposes of the numerator and denominator of the allocation fraction. Nonrevenue miles, such as deadheading, are not included in the

numerator and denominator. New York State Department of Taxation and Finance, Technical Services Bureau Memorandum dated March 12, 1982 (TSB-M-82[9]C) set out in Addendum C.

Subdivision (f) of section 184 provides that

“where the tax commission decides that with respect to a certain corporation the method prescribed above does not fairly and equitably reflect gross earnings from all sources with this state, the tax commission shall prescribe methods of allocation or apportionment which fairly and equitably reflect gross earnings from all sources within this state.”

The New York Court of Appeals affirmed the judgment of the New York Supreme Court that the tax is constitutional for the reason stated by the lower court adding that

“the subject tax law empowers the tax commission to adjust the allocation formula with respect to a particular corporation to ‘fairly and equitably reflect gross earnings from all sources within this state’ (Tax Law, § 184, subd 4, par [f]).” (App 1a)

The lower court found that

“what the statute in substance does is to apportion gross receipts into two groups; those having a substantial nexus with the State of New York based upon actual revenue miles in the State of New York and those gross receipts derived wholly from external sources. Thus the New York statute taxes 100 percent of gross receipts based upon New York

State revenue miles and does not in any way tax gross receipts based upon revenue miles in other states or countries." (App 7a)

ARGUMENT.

The appellants have not raised a substantial Federal question since it is evident that the New York Tax Law, § 184 imposes a tax only on gross earnings which have a substantial nexus with the state, are fairly apportioned and does not conflict with the due process and commerce clauses.

For the purposes of the due process and commerce clauses of the United States Constitution, where a taxpayer has a substantial nexus with a State and where there is a rational relationship between the tax imposed on the taxpayer's business activity within the State and benefits afforded by the State, the tax will be upheld unless it is shown that the tax discriminates against interstate commerce or is not fairly apportioned. *Complete Auto Transit v. Brady*, 430 US 274, 279 (1977).

The appellants contend (Jur Stat, p 12) that the New York tax is unconstitutional not because the statute provides for "an unfair method of apportionment but because it seeks to apportion gross receipts that, because they lack a nexus with New York, may not be apportioned by any method." They argue that earnings from trips totally outside of New York cannot be included in the apportionment formula because such inclusion constitutes extraterritorial taxation, which is prohibited by the Commerce and Due Process Clauses of the United States Constitution. In so arguing, they leap to the baseless conclusion that because earnings from activities outside of New

York are included in the formula used to determine New York gross earnings, earnings from without the State are being taxed by New York.

The appellants do not question the jurisdiction of New York to impose a franchise tax on them measured by their New York gross earnings. It is well-settled and the appellants do not dispute that States can tax gross receipts of transportation companies, engaged in interstate commerce, apportioned to in-State activities determined by mileage.

In *Maine v. Grand Trunk Railway Company*, 216 US 217 (1891), the state statute required corporations operating a railroad to pay an annual franchise tax determined by the amount of its gross transportation receipts and when applied to a railroad lying partly within and partly without the State, including Canada, the gross receipts were determined in proportion to the number of miles of railroad operated in the State to the total number of miles the railroad operated. The Court held that the tax did not conflict with the United States Constitution.

In *Central Greyhound Lines, Inc. v. Mealey*, 334 US 653d (1948), New York taxes unapportioned gross receipts from transportation between points within the State, but over routes which utilized highways of Pennsylvania and New Jersey to the extent of 42.53%. The Court held that New York could tax gross receipts from the transportation apportioned as to the mileage within the State, but the tax on the gross receipts from that portion of the mileage outside the State unduly burdens interstate commerce in violation of the Commerce Clause of the United States Constitution. The Court noted that the entire New York tax did not need to fall, however, and it could be fairly apportioned to the business done within the State by a fair

method of apportionment. The statute under consideration permitted such apportionment and the matter was remanded by the Court to the New York Court of Appeals to determine the apportionment. On remand, the New York Court of Appeals modified the determination of tax liability to the extent of 42.53% of the tax involved (298 NY 876 [1949]).

In *Canton Railroad Co. v. Rogan*, 340 US 511 (1951), and *Western Maryland Railroad Co. v. Rogan*, 340 US 520 (1951), Maryland imposed a franchise tax on railroads measured by gross receipts apportioned to the length of their lines within the State. The Court sustained the tax as not violative of the Commerce Clause and the Import-Export Clause of the United States Constitution.

In *Railway Express Agency, Inc. v. Virginia*, 358 US 434 (1959), a franchise tax was levied by Virginia only on express companies measured by gross receipts derived from operations within the State including receipts from transportation within the State of express transported through, into or out of the State. As applied to a foreign corporation doing an exclusive interstate business in the State and owning property there, the Court held that the tax did not violate the Commerce Clause of the United States Constitution. The Court at 358 US 444, 445 said:

“As this Court said in *Nashville, C. & St. L. R. v. Browning*, 310 U. S. 362, 365-366 (1940):

“ ‘In basing its apportionment on mileage, the Tennessee Commission adopted a familiar and frequently sanctioned formula. *Pullman's Car Co. v. Pennsylvania*, 141 U. S. 18; *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217; *Pittsburgh, C., C. & St. L. Ry. Co. v. Backus*, 154 U. S. 421; *Branson v. Bush*,

251 U. S. 182. See 2 Cooley on Taxation, pp. 1660-64. Its asserted inapplicability to the particular situation is rested on petitioner's evidence as to the comparative revenue-producing capacity of its lines in and out of Tennessee. But both the Commission and the Supreme Court of the state thought that this evidence, however weighty, was insufficient to displace the relevance of the formula. *In a matter where exactness is concededly unobtainable and the feel of judgment so important a factor, we must be on guard lest unwittingly we dispute the tax officials' judgment with our own. Certainly we cannot say that the combined judgment of Commission, Board, and state courts is baseless.*' (Emphasis added.)"

While *Railway Express* involved a taxpayer's failure to file complete information on in-State activities, the case does not include any words limiting its holding to such situations in upholding a formula which used miles in the State of Virginia over miles in all other States times all gross receipts.

Appellants' contention that earnings from transportation outside of New York may not be included in the apportionment formula because it constitutes extraterritorial taxation is demonstrably without merit and contrary to fact. Appellants have not shown that the formula will reach earnings which are not from New York sources.

It is only by conjecture that it is possible for New York to reach earnings of the appellants which are not from New York sources by the mechanical application of the apportionment formula. This could occur if the appellants on the average charged rates for shipments at a higher

level in jurisdictions other than New York. The appellants do not claim this nor have they demonstrated that they do this. Indeed, one can assume they would have attempted to make such a showing if it were the case, since they have the requisite information available. For that matter, New York shipping rates may be higher than those of other jurisdictions. As the cases discussed above show, it is reasonable to assume in the first instance that shipping rates are the same in all jurisdictions or that they average out to be the same in each jurisdiction. In the event this assumption could be shown to be incorrect, it still would not result in New York reaching extraterritorial values.

The New York statute is designed to prevent New York from imposing tax on any earnings which are not from New York sources by the application of the allocation formula. Under the provisions of subdivision (f) of section 184 of the New York Tax Law, gross earnings from transportation activities in other jurisdictions must be excluded from the formula if the statutory formula inequitably reflects earnings from outside New York. Only earnings from New York sources are subject to the tax. The tax rate is applied only to those gross earnings. No other State has jurisdiction to tax those earnings. Thus, the New York law in no way calls for multistate taxation of New York gross earnings.

Even if some overlapping taxation were possible under the allocation formula, it would not be sufficient to invalidate the formula. The Court in *Japan Lines, Ltd. v. County of Los Angeles*, 441 US 434, 455 (1979), pointed out:

“Yet, this Court consistently had held that the Commerce Clause ‘does not call for mathematical

exactness nor for the rigid application of a particular formula; only if the resulting valuation is palpably excessive will it be set aside.' "

The appellants, citing *Japan Lines, Ltd.*, appear to contend (Jur Stat, p 14) that the apportionment provisions of the tax do not protect taxpayers from multiple taxation of their gross earnings because foreign countries can and do tax 100% of the value of property used in foreign commerce. There has been no showing made nor any claim made that Canada does or could tax New York gross earnings under its laws or its treaties with this country. No Federal law has been cited by the appellants which would preempt New York from imposing the tax. The holding in *Japan Lines, Ltd. v. County of Los Angeles*, 441 US 434 (*supra*), is no barrier to the § 184 tax. The issue in that case was whether instrumentalities of commerce, cargo containers that are owned, based and registered abroad, and that are used exclusively in international commerce, may be subject to apportioned *ad valorem* taxation by a State. The New York tax is distinguishable because it is not imposed on property. No claim has been made here that the New York tax prevents the Federal government from speaking with one voice in regulating commercial relations with foreign governments. The mere risk of exposure to multiple taxation certainly does not present this Court with a constitutional basis to invalidate the franchise tax. See *Moorman Mfg. Co. v. Blair*, 437 US 267 (1979) and *General Motors v. Washington*, 377 US 436, 448 (1964). In *Moorman*, the Court held that not only is it a prerequisite for a taxpayer to show that the State, whose taxation is being complained of, along with other States tax more than 100% of the taxpayers' relevant revenues, but it is also essential to show that the allegedly offending State, rather than some other State, was necessarily at fault in a

constitutional sense. New York cannot be found at fault, in the constitutional sense, with respect to the claim of double taxation. There is no substantiation of the claim of double or extraterritorial taxation and, indeed, the allocation utilized for the franchise tax has been constitutionally approved. It is the result reached not the method employed which is controlling. See *Federal Power Commission v. Conway Corp.*, 426 US 271, 279, 280 (1976); *Colorado Interstate Co. v. Federal Power Commission*, 324 US 581, 604 (1945).

New York's apportionment formula is the practical way to reach gross earnings from all sources in New York from transportation. It would not be feasible to sift out New York gross earnings without using an apportionment formula where a trucking company makes a single charge for a trip between a point in New York to a point in another State and different types of goods are transported with several pick up and delivery stops being made in both states.

Moreover, requiring trucking companies to report all gross receipts and revenue miles within and without the State, advances administrative convenience and verification of the tax. Administrative convenience within reasonable limits has been advanced by this Court to uphold the validity of federal and state tax laws (e.g. *Califano v. Goldfarb*, 430 US 199 [1977]; *Kahn v. Shevin*, 416 US 351 [1974]; *Halliburton Oil Well Cementing Co. v. Reily*, 373 US 64 [1963]; *New York Rapid Transit Corp. v. City of New York*, 303 US 573, 580, 581 [1938]; *Burnet v. Wells*, 289 US 670 [1933]). Gross earnings from transportation can be verified by examination of audited Federal corporation tax returns. 49 CFR Part 1249 requires motor carriers to file Form-M reports with the Interstate Commerce Commission on which their total inter-city transportation mileage is listed. These reports are available to

the New York State Tax Commission. Transportation companies file New York highway use and fuel tax reports which show New York highway mileage. As a result, State tax auditors by being able to use all these reports reduce and simplify field and desk audits which could not be done as conveniently and efficiently under a different allocation formula. The allocation formula deters trucking companies from improperly assigning earnings to out-of-State business. Certainly New York has the right to examine the books and all of the earnings of trucking corporations doing business in New York to determine if all New York earnings are reported. By requiring all earnings from transportation to be reported, New York does no more than examine all of the taxpayer's earnings but does not tax them.

The appellants contend (Jur Stat, pp 15-18) that New York is attempting to justify the tax under the unitary business principle and claim that the principle does not apply to gross receipts taxes. The tax needs no such justification nor have the courts below attempted to apply the principle in declaring that the tax does not violate the United States Constitution.

From all the foregoing, we submit that there is no substantial Federal question presented by this appeal.

CONCLUSION.

**The appeal should be dismissed or, in the alternative,
the order affirmed.**

Dated: Albany, New York
February 3, 1984

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
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PETER H. SCHIFF
Acting Attorney in Chief
Appeals and Opinions

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ADDENDUM A.

REMITTITUR.

COURT OF APPEALS,

STATE OF NEW YORK.

The Hon. Lawrence H. Cooke, Chief Judge, Presiding.

Sup C

No. 432

AMERICAN TRUCKING ASSOCIATION, Inc., *et al.*,

Appellants,

v.

NEW YORK STATE TAX COMMISSION, *et al.*,

Respondents.

The appellants in the above entitled appeal appeared by Schnader, Harrison, Segal & Lewis, Esqs.; the respondents appeared by Hon. Robert Abrams, Attorney General.

The Court, after due deliberation, orders and adjudges that the judgment is affirmed, with costs, in a memorandum. Chief Judge Cooke and Judges Jaser, Jones, Wachtler, Meyer, Simons and Kaye concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Albany County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

JOSEPH W. BELLACOSA
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, October 20,
1983.

ADDENDUM B.

**CONSTITUTIONAL AND STATUTORY
PROVISIONS.**

United States Constitution, Article I, section 8, clause 3
(the "Commerce Clause"):

"The Congress shall have power * * * To regulate commerce with foreign nations, and among the several states, and with Indian tribes."

United States Constitution, Fourteenth Amendment
(the "Due Process Clause"):

"[N]or shall any state deprive any person of life, liberty, or property, without due process of law
* * *."

New York Tax Law, § 184 as amended by chapter 486 of the New York Laws of 1981 provides in pertinent part:

"§ 184. Additional franchise tax on transportation and transmission corporations and associations

"1. Every corporation, joint-stock company or association formed for or principally engaged in the conduct of aviation, surface railroad, whether or not operated by steam, subway railroad, elevated railroad, canal, steamboat, ferry (except a ferry company operating between any of the boroughs of the city of New York under a lease granted by the city), express, navigation, pipe line, transfer, baggage express, omnibus, trucking, taxicab, telegraph, telephone, palace car or sleeping

car business, or formed for or principally engaged in the conduct of two or more of such businesses and every other corporation, joint-stock company or association formed for or principally engaged in the conduct of a transportation or transmission business not liable to taxation under section one hundred eighty-six of this chapter, for the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in this state in a corporate or organized capacity, or maintaining an office in this state, shall pay a franchise tax which shall be equal to three-quarters of one per centum upon its gross earnings from all sources within this state * * *.

* * *

"4. Allocation of gross earnings from transportation and transmission services.—(a) General. A transportation or transmission corporation shall determine its gross earnings from transportation and transmission services within this state (except as otherwise provided for in this subdivision) by multiplying its gross earnings from transportation and transmission within and without the state by a fraction, the numerator of which is the taxpayer's mileage within this state and the denominator of which is the taxpayer's mileage within and without this state during the period covered by the report or reports required by this chapter.

* * *

"(c) All other gross earnings, if any, shall be allocated to this state in the manner prescribed by

rules and regulations promulgated by the tax commission.

“(f) With respect to other types of transportation and transmission corporations or where the tax commission decides that with respect to a certain corporation the method prescribed above does not fairly and equitably reflect gross earnings from all sources within this state, the tax commission shall prescribe methods of allocation or apportionment which fairly and equitably reflect gross earnings from all sources within this state. Also, the tax commission may, in order to properly reflect gross earnings, determine the report period in which any item of gross earnings shall be included without regard to the method of accounting employed by a corporation taxable hereunder.”

ADDENDUM C.

**NEW YORK STATE DEPARTMENT OF TAXATION
AND FINANCE**

TAXPAYER SERVICES DIVISION

Technical Services Bureau

TSB-M-82(9)C
Corporation Tax
March 12, 1982

**1981 LEGISLATION—SECTION 184 OF THE TAX
LAW—ALLOCATION OF GROSS EARNINGS FROM
TRANSPORTATION SERVICES OF CORPORA-
TIONS PRINCIPALLY ENGAGED IN TRUCKING.**

Chapter 486 of the Laws of 1981 provides for the allocation of gross earnings from transportation services of corporations principally engaged in trucking. The allocation of gross earnings from transportation services of such corporations is contained within the general allocation formula contained in section 184 of the Tax Law (Tax Law, § 184(4)(a)):

Allocation generally—A transportation corporation shall determine its gross earnings from transportation and transmission services within the state (except as otherwise provided in section 184, e.g., aviation corporations, corporations engaged in the operation of vessels and telephone and telegraph corporations) by multiplying its gross earnings from transportation and transmission within and without the state by a fraction, the

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numerator of which is the taxpayer's mileage within the state and the denominator of which is the taxpayer's mileage within and without this state during the period covered by the report or reports required under Article 9 of the Tax Law.

With respect to trucking corporations, "mileage" in the context of the above-stated provision means actual revenue miles for purposes of both the numerator and denominator of the allocation fraction. Nonrevenue miles, such as deadheading, are not included in either the numerator or denominator of the allocation fraction. The allocation formula with respect to trucking corporations takes into account actual revenue producing activity both within and without the State of New York.

Accordingly, a trucking corporation whose transportation services are performed within and without New York State will allocate its total gross earnings from transportation services within and without New York State on the basis of the following fraction to arrive at allocated gross earnings from transportation services to be included in the section 184 tax base.

<u>Actual revenue miles within NYS</u>		total gross earnings		Allocated gross
Actual revenue miles within & without NYS	X	from transportation service	=	earnings from transportation services subject to tax

A trucking corporation which renders transportation service solely within the State of New York must allocate 100% of its gross earnings from transportation services to the State of New York.

Gross earnings from other than transportation services (interest, dividends, etc.) shall be allocated to New York

State, pursuant to section 184(4)(e), in accordance with the rules and guidelines set forth by the State Tax Commission in *The Matter of American Telegraph and Telephone Co.*, (11/13/81); *The Matter of RCA Global Communications, Inc.*, (11/13/81); *The Matter of ITT World Communications, Inc.*, (11/13/81); and *The Matter of Overseas National Airways, Inc.*, (1/22/82).

The provisions under Chapter 486 of the Laws of 1981 are effective for all taxable periods beginning on or after January 1, 1981.

No. 83-1196

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

Office - Supreme Court, U.S.

FILED

FEB 29 1984

ALEXANDER L. STEVENS
CLERK

AMERICAN TRUCKING ASSOCIATIONS, INC., NEW YORK
STATE MOTOR TRUCK ASSOCIATION, INC., NEW
YORK STATE MOVERS' AND WAREHOUSEMEN'S AS-
SOCIATION, INC., FORT EDWARD EXPRESS CO.,
HALLAMORE MOTOR TRANSPORTATION, INC.,
MAISLIN TRANSPORT OF DELAWARE, INC., MUSH-
ROOM TRANSPORTATION CO., RED STAR EXPRESS
LINES OF AUBURN, INC., SHAY'S SERVICE, INC., and
TEAL'S EXPRESS, INC.,

Appellants,

v.

NEW YORK STATE TAX COMMISSION, JAMES H. TULLY
JR., THOMAS H. LYNCH, and FRANCIS KOENIG,
Members of the New York State Tax Commission,
and ROBERT ABRAMS, Attorney General of the State
of New York,

Appellees.

On Appeal From the Court of Appeals of New York

**BRIEF IN OPPOSITION TO APPELLEES'
MOTION TO DISMISS OR AFFIRM**

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Appellees.

On Appeal From the Court of Appeals of New York

**BRIEF IN OPPOSITION TO APPELLEES'
MOTION TO DISMISS OR AFFIRM**

1. The Section 184 Tax Is Invalid Because It Fails to Satisfy the Nexus Test of *Complete Auto Transit v. Brady*.

At page 5 of their Motion to Dismiss or Affirm, Appellees misstate the test established by this Court in *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977). Appellees suggest that the nexus prong of the test is met, "where a taxpayer has a substantial nexus with a

State," and cite this Court's opinion in *Complete Auto* at page 279. Motion to Dismiss or Affirm at 5. However, at the cited page, this Court stated that taxes imposed on interstate commerce activities may be sustained when the tax is, among other things, "applied to an activity with a substantial nexus with the taxing State. . . ." *Id.* (emphasis added). A nexus with the transaction taxed and not merely a nexus with the taxpayer is required. See Jurisdictional Statement at 8-11.

At page 12 of their Motion to Dismiss or Affirm, Appellees deny that New York is attempting to justify the tax under the unitary business principle. However, where as here the tax reaches all gross receipts of taxpayers without regard to nexus, it could *only* be considered to meet the nexus requirement if that principle applied. There can be no doubt, nor do Appellees deny, that the tax applies a formulary apportionment to Appellants' nationwide gross receipts. However, as this Court has recently emphasized, such a formulary apportionment and the unitary business principle are two sides of the same coin. *Container Corp. of America v. Franchise Tax Board*, 103 S. Ct. 2933, 2939-43 (1983). Thus, if the unitary business principle does not supply the needed nexus with Appellants' non-New York activities, that nexus does not exist and the tax must be struck down.

Until now, states imposing taxes on business activity taking place in more than one jurisdiction have been required to divide the tax base among the various jurisdictions either on the separate allocation (or geographical assignment) principle or on the unitary business/formulary apportionment principle. Appellees now argue that this tax should be upheld although they apparently concede that it satisfies neither of these principles.

Appellees seek to justify the tax on the ground that it reaches only a fictional something called "New York gross earnings," which earnings are determined by the

formulary apportionment, and that it does not reach the actual gross receipts that are made subject to that apportionment. The core of Appellee's argument appears to be that even though the present tax reaches all gross receipts of the Appellants wherever earned, it does not *tax* those receipts. Thus, Appellees argue that, "[i]t is only by conjecture that it is possible for New York to reach earnings of the appellants which are not from New York sources" Motion to Dismiss or Affirm at 8. However, it is undisputed that five of the motor carrier Appellants (and many additional members of the trade association Appellants) have substantial gross receipts from transactions having no connection whatever to New York (Stipulation of Facts, Paragraphs 8(b)(F); 8(c)(F); 8(d)(F), 8(f)(F); Affidavit of Franklin Seligman, Paragraph 3(f)), and that all of those non-nexus receipts are included in New York's apportionable tax base. Moreover, it is undisputed that one of the motor carrier Appellants, Maislin, has gross receipts from intrastate commerce in Pennsylvania and that Pennsylvania imposes a tax on 100% of those receipts. Affidavit of Franklin Seligman, Paragraph 3(f); 72 P.S. Section 8101. To argue as Appellees do, that New York does not also tax an apportioned share of those non-nexus receipts is simply not in accordance with reality.

It is no answer to New York's inclusion of non-nexus receipts in the tax base that the equitable apportionment provision of Section 184(f) of the Tax Law *permits* the Tax Commission to grant relief to specific taxpayers who can prove that they are overtaxed. Equitable apportionment provisions are intended to provide flexibility in circumstances where an apportionment formula, as applied to activities having nexus with the taxing state, does not properly reflect the extent to which those activities took place within the state. Such provisions were never intended, and cannot be used, to extend the reach of an apportionment formula to activities lacking a nexus. Moreover, and more importantly, a *per-*

missive provision for equitable apportionment, such as Section 184(f), cannot be construed to cure the unconstitutional reach of this tax.

2. Appellees' Appeal to Practicality and Administrative Convenience Is Without Merit.

Appellees argue that the Section 164 tax is justifiable because:

New York's apportionment formula is the practical way to reach gross earnings from all sources in New York from transportation. It would not be feasible to sift out New York gross earnings without using an apportionment formula where a trucking company makes a single charge for a trip between a point in New York to a point in another State and different types of goods are transported with several pickup and delivery stops being made in both states.

Motion to Dismiss or Affirm at 11. Appellants would agree with that statement and agree that formula apportionment is proper with respect to gross receipts earned for a trip between a point in New York and a point in another state. However, Section 184 does not take the clearly practical (and constitutionally required) step of eliminating from the gross receipts taxed by New York, all gross receipts earned through trips having no contact whatever with New York.

Appellees' appeal to administrative convenience is also without merit.¹ New York, like most other states,

1. All but one of the cases cited by Appellees on this point are totally inapposite. *Califano v. Goldfarb*, 430 U.S. 199 (1977), and *Halliburton Oil Well Cementing Company v. Reilly*, 373 U.S. 64 (1963), both struck down statutes in the face of a claim of administrative convenience. *Kahn v. Shevin*, 416 U.S. 351 (1974), and *Burnet v. Wells*, 289 U.S. 670 (1933), both upheld tax statutes but not, to any degree, on the ground of administrative convenience. The remaining case, *New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573 (1938), did cite administrative convenience along with a host of other grounds for upholding the tax; however, it is clear that administrative convenience was in no sense dispositive in that case.

imposes an apportioned net income tax on most business corporations. Such taxes are administratively convenient for the states because they typically are based on net income as reported to the Federal government and the states are therefore able to rely on the Internal Revenue Service for most audit and enforcement activities. If New York chooses to impose on transportation companies a different kind of tax, it is not entitled to reduce the resulting audit burdens by sweeping aside constitutional limitations on taxation of interstate commerce.

Appellees suggest that if the tax were limited to transactions having a nexus, taxpayers could somehow improperly assign earnings to out-of-state business. Motion to Dismiss or Affirm at 12. However, the exclusion of non-nexus receipts from New York's tax would not provide any such opportunities — the question whether particular earnings resulted or did not result from transportation having a nexus with New York is not subject to manipulation.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Appellants' Jurisdictional Statement, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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